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Nos. 07-1059 & 07-1078

IN THE

# Supreme Court of the United States

UNITED STATES OF AMERICA,
*Petitioner*,

v.

EURODIF S.A., *ET AL.*,
*Respondents*.

USEC INC., *ET AL.*,
*Petitioners*,

v.

EURODIF S.A., *ET AL.*,
*Respondents*.

**On Writs of Certiorari to the United States Court of Appeals for the Federal Circuit**

## BRIEF AMICUS CURIAE OF ALCOA, INC. IN SUPPORT OF RESPONDENTS

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**On Writs of Certiorari to the United States Court of Appeals for the Federal Circuit**

## BRIEF AMICUS CURIAE OF ALCOA, INC. IN SUPPORT OF RESPONDENTS

## STATEMENT OF INTEREST OF AMICUS CURIAE[1]

[1] Pursuant to Sup. Ct. R. 37.6, *amicus* notes that no counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief through consent letters filed with the Clerk's Office.

Alcoa Inc. ("Alcoa") is the world's leading producer of primary aluminum, fabricated aluminum and alumina. It serves customers in the defense, aerospace, construction, transportation, and industrial markets with aluminum products including structural materials, forgings, extrusions, castings, fastening systems, and electrical distribution systems for cars and trucks. Alcoa has 97,000 employees in 34 countries (28,000 in the United States) and was named one of the world's most sustainable corporations at the World Economic Forum in Davos, Switzerland.

The question presented in this case is of significant importance to Alcoa in two principal ways. The first is that this case involves the Court's first interpretation of the scope of the antidumping statute. As a global producer of aluminum and aluminum products, Alcoa is also a global consumer of numerous internationally traded products that are or may be subject to antidumping duties. Alcoa relies on key commodity imports to supply its U.S. operations and to maintain its competitive position. Alcoa thus has a keen interest in the Court's interpretation of international trade laws, including the antidumping statute.

This case also necessarily concerns issues that ultimately affect the cost of electricity in the United States—leading to Alcoa's second principal interest in this case. Alcoa is among the largest non-governmental consumers of electricity in the Nation, if not the largest. A decision of this Court in favor of petitioners—thereby permitting the Department of Commerce ("Commerce") to impose antidumping

duties on low enriched uranium imports from France regardless of whether the imports are "sold"—will increase the cost of electricity production at domestic nuclear power plants, adversely affecting Alcoa and its ability to remain competitive in the United States.

Alcoa has participated in antidumping proceedings before Commerce and the International Trade Commission ("ITC") involving imports of magnesium (as a producer and consumer) and aluminum metal (as a producer). *See, e.g.*, *Magnesium Metal from the Russian Federation*, 73 Fed. Reg. 52,642 (ITA Sept. 10, 2008); *Magnesium from China and Russia*, USITC Pub. 3763, Inv. Nos. 731-TA-1071 and 1072 (Final) (Apr. 15, 2005); *Aluminum Plate from South Africa*, USITC Pub. 3734, Inv., No. 731-TA-1056 (Final) (Nov. 26, 2004); *Certain Aluminum Plate From South Africa*, 69 Fed. Reg. 60,610 (ITA Oct. 12, 2004). In each of these proceedings, Alcoa has argued for the fair interpretation of the antidumping law and an accurate calculation of antidumping duties by Commerce.

Alcoa previously has filed briefs *amicus curiae* in cases before the Court affecting international trade regulation, *see United States* v. *United States Shoe Corp.*, 523 U.S. 360 (1998), and American business generally, *see Gratz* v. *Bollinger*, 539 U.S. 244 (2003) (*amicus* brief of 65 Leading American Businesses); *Metropolitan Life Ins. Co.* v. *Taylor*, 481 U.S. 58 (1987) (*amicus* brief of ERISA Industry Committee).

## INTRODUCTION

The antidumping statute was enacted to respond to concerns that foreign companies would "dump" goods stockpiled during World War I into the United States market at prices so low that domestic industries could not compete. From its enactment in 1921 until the present, the fundamental purpose of the antidumping law has been to identify and remedy sales of foreign merchandise in the United States below their fair value. The statute, which defines dumping as "the sale or likely sale of goods at less than fair value," 19 U.S.C. 1677(34), makes that plain.

In this case, the domestic entity in the business of enriching uranium sought to impose an antidumping duty on *all* low enriched uranium ("LEU") entering the United States from France.[2] Imported LEU (uranium enriched in $U^{235}$), which is used as fuel for nuclear plants, enters the U.S. market in two ways. First, a utility may purchase LEU from another entity through what is known as an enriched uranium product contract, or EUP contract. An EUP contract involves "the sale or likely sale of goods"

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[2] LEU is necessary to fabricate nuclear fuel rods for use in nuclear reactors. The 5 steps involved in nuclear fuel production are: "(1) mining uranium ore; (2) milling and/or refining the ore into uranium concentrate, referred to as natural uranium ($U_3O_8$); (3) converting the natural uranium into uranium hexafluoride ($UF_6$), or 'feed uranium'; (4) enriching uranium hexafluoride to create low enriched uranium; and (5) using the low enriched uranium to fabricate nuclear fuel rods for use in nuclear reactors." U.S. Pet. App. 38a.

from one entity to another and could be subject to antidumping duties if that sale occurs "at less than fair value." 19 U.S.C. 1677(34). This case is not about EUP contracts.

The second way a utility may obtain LEU is to provide uranium "feed" from uranium ore or oxide to an entity that performs the service of separating the uranium feed into LEU and depleted uranium ("tails"). The utility pays the enricher based on the amount of energy needed to separate the feed into its enriched and depleted components. This energy expenditure is measured in "separative work units," or "SWUs." The contract for this separation process is accordingly referred to as a SWU (pronounced "swoo") contract. In a SWU contract, the contract only contemplates—and only includes consideration for—enrichment services.

This case is about whether a SWU contract for enrichment services supports the imposition of antidumping duties. The Court of International Trade and the Federal Circuit concluded that the antidumping statute unambiguously applies only to sales of goods, and not to the enrichment services provided under SWU contracts. This Court should affirm.

## SUMMARY OF ARGUMENT

Antidumping duties have been imposed on products ranging from ammonium nitrate to wooden bedroom furniture, including such varied products as magnesium, silicon, steel, ironing tables, pressure-sensitive plastic tape, top-of-the-stove stainless-steel cookware, and natural-bristle paint brushes. In the over eighty years of antidumping duties preceding

this case, no antidumping duty has ever been imposed without a sale or likely sale of merchandise in the United States.[3] Petitioners are asking this Court to do just that. They seek to expand—judicially, rather than legislatively—the reach of the antidumping law to include enrichment services contracts.

This sort of expansion of the antidumping law would be contrary to the plain and ordinary meaning of the statute's terms—which require that "merchandise" be "sold," *i.e.*, that title to a good be transferred for consideration, before an antidumping duty can attach. Courts have regularly recognized that "sales" are a common event and that use of the word "sale" in a statute indicates the ordinary, everyday meaning of the word. And unlike other international trade statutes, the antidumping law requires *sales*, not just imports, to trigger the remedies it offers.

Antidumping duties are designed to provide relief to domestic industries injured by international price discrimination. This narrowly focused statute does not make it illegal to dump goods; rather, it subjects the goods to a duty "sufficient to equalize competitive conditions." 42 A.L.R. Fed. 821 (citing *C.J. Tower & Sons* v. *United States*, 21 C.C.P.A. 416, 71 F.2d 438 (1934)). The key requirement in imposing this duty

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[3] For a complete list of products on which antidumping duties are in place (238 as of September 10, 2008), *see* http://www.usitc.gov/trade_remedy/731_ad_701_cvd/investigations/antidump_countervailing/index.htm. Commerce case numbers beginning with "A" or "AA" involve antidumping orders.

is that there be a sale of a good in the United States for less than fair value. That has been the scope of the statute for 87 years, and it should remain the scope now.

Petitioners sound a false alarm by arguing that their interpretation is necessary to correct a perceived "loophole" in the statute. It is not and has never been the task of the judiciary to re-write a statute. Congress is quite capable of remedying any statutory "loophole" it perceives needs correcting—and it has done so before in the antidumping statute. The practical realities of doing business in the global market also rebut petitioners' concern that global industries will rush to exploit any "loophole" left by the lower court's straightforward statutory interpretation. And there are statutes other than the narrowly targeted antidumping law at issue here that remain available to entities threatened with competitive injury from service contracts.

## ARGUMENT

### I. THE ANTIDUMPING STATUTE IS UNAMBIGUOUS.

#### A. The Federal Circuit And The Court Of International Trade Properly Terminated Their Inquiries At The First *Chevron* Step.

##### 1. The ordinary meaning of the words "merchandise * * * sold" is clear.

In *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Court announced a two-step framework for evaluating

whether an agency's interpretation of a statute is lawful. The first step asks whether the statute "unambiguously expressed" the intent of Congress. *Id.* at 843. At this threshold inquiry, "[i]f, by 'employing traditional tools of statutory construction,' [the Court] determine[s] that Congress' intent is clear, 'that is the end of the matter.'" *Regions Hosp.* v. *Shalala*, 522 U.S. 448, 457 (1998) (quoting *Chevron*, 467 U.S. at 842, 843 n.9). That is because "the judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Chevron*, 467 U.S. at 843 n.9. It is only "if the statute is silent or ambiguous with respect to the specific issue" that courts proceed to analyze whether the agency's construction of the statute is reasonable. *Id.*; *see also FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000).

Both the Court of International Trade and the Federal Circuit determined that Congress had unambiguously expressed its intent that antidumping duties apply only to sales of goods—not to contracts for services. Neither court therefore found it necessary to reach the second step of the *Chevron* framework. Both courts were correct to stop at step one.

Congress unambiguously expressed its intent that the antidumping statute apply when "foreign *merchandise* is being, or is likely to be *sold*" in the United States at less than its fair value. 19 U.S.C. § 1673 (emphases added). "Dumping" involves, according to Congress, "sales or likely sales of goods." *Id.* at 1677(34). Despite this clear language, petitioners and their *amicus* Committee to Support

U.S. Trade Laws ("CSUSTL") would prefer the Court bypass the first *Chevron* inquiry and proceed straight to the sheltering deference built into the second step of the analysis.[4] But neither the term "merchandise" nor the term "sold" is unclear, nor indeed do petitioners or their *amicus* offer any ambiguity. Instead, they simply assert that the Judiciary should simply defer to Commerce and grant it discretion to interpret the "merchandise * * * sold" prerequisite to imposition of antidumping duties as encompassing contracts for enrichment services.

But Commerce only obtains this sort of law-making discretion where the terms of the statute are ambiguous. It is not the function of the Executive—or the Judiciary—"to engraft on a statute additions which [it] think[s] the legislature logically might or should have made." *United States* v. *Cooper Corp.*, 312 U.S. 600, 605 (1941). Instead, "[s]tatutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the

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[4] The United States claims it is "undisputed" that the antidumping statute does not speak directly to the precise question at issue here. U.S. Br. 23. The antidumping statute does not speak specifically to contracts for uranium enrichment services; that much is true. But as both the Federal Circuit and the Court of International Trade correctly held, the antidumping statute applies unambiguously only to contracts for the sale of goods. U.S. Pet. App. 11a. And both courts also correctly rejected Commerce's effort to re-cast enrichment services contracts as contracts for the sale of goods. U.S. Pet. App. 12a, 17a, 33a-34a.

legislative purpose." *Engine Mfrs. Ass'n* v. *South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004) (quoting *Park 'N Fly, Inc.* v. *Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985)). *See also Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) (emphasizing that the "ordinary meaning" of terms used by Congress indicates congressional intent). In construing the antidumping law, like any other law, "resort may not be had to extraneous matters to create an ambiguity in the language of the statute where none otherwise exists." *C.J. Tower & Sons* v. *United States*, 46 C.C.P.A. 36, 38, 1958 WL 7342 (1958) (interpreting antidumping law according to ordinary meaning).

The ordinary meaning of "merchandise" that is "sold" is plain on its face; it leaves no gap for Commerce to fill. "Merchandise" is a tangible good or ware. *See Black's Law Dictionary* 986 (6th ed. 1990) (defining merchandise as "[a]ll goods which merchants usually buy or sell, whether at wholesale or retail; wares and commodities such as are ordinarily the objects of trade and commerce"); *Webster's Third New Int'l Dictionary Unabridged* 1413 (2002) (defining "merchandise" as "the commodities or goods that are bought and sold in business: the wares of commerce). And to involve a "sale" of merchandise, there must be a seller who pays a buyer a sum of money (consideration), in exchange for which the seller "transfers title" to the goods to the buyer. *Black's Law Dictionary*, *supra*, at 1337; *accord Webster's Third New Int'l Dictionary Unabridged*, *supra*, at 2003 (defining "sale" as "a contract transferring the absolute or general

ownership of property from one person or corporate body to another for a price").

As this Court made clear over 150 years ago, "[s]ale is a word of precise legal import" that "means a contract between parties to take and to pass rights of property for money, which the buyer pays or promises to pay to the seller for the thing bought and sold." *Williamson* v. *Berry*, 49 U.S. 495, 496 (1850); *see also Butler* v. *Thomson*, 92 U.S. 412, 415 (1875) ("The essential idea of a sale is that of an agreement or meeting of minds by which a title passes from one, and vests in another.").[5]

### 2. The statutory language restricts application of antidumping duties to "merchandise" "sold" or "likely to be sold" in the United States.

Congress chose not to enact an antidumping statute that applies to every import that reaches our Nation's shores. The law it passed requires a sale of merchandise. 19 U.S.C. § 1673. As a result, transactions other than sales of goods cannot trigger antidumping duties. Those involving, for example,

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[5] *Amicus* CSUSTL admits that "technical[ly]" there was not a sale of goods—because there was no transfer of title—but suggests that the Court ignore this "technical[ity]" and permit antidumping duties anyway. CSUSTL Br. 4; *see also* U.S. Pet. App. 33a (petitioners "concede that a sale of goods requires a transfer of ownership"). But Congress did not treat the existence (or lack thereof) of a sale of goods as a technicality. Absent a sale or likely sale of foreign merchandise in the United States, a transaction is outside the bounds of the antidumping law.

"a conveyance for a limited and restricted use" fall short of being sales of merchandise. *J.H. Cottman & Co.* v. *United States*, 20 C.C.P.A. 344, 356 (1932) (applying "ordinary meaning" of sales in antidumping law). Giving away free samples also does not trigger the statute. *NSK Ltd.* v. *United States*, 115 F.3d 965, 974 (Fed. Cir. 1997) (rejecting the government's argument that ordinary meaning of "sales" did not require consideration). Commerce itself recognized in *NSK* the unambiguous parameters of the word Congress chose to employ: In *NSK*, Commerce asserted a "long-standing policy" of considering a transaction a "sale" for purposes of a dumping analysis where an ownership transfer occurs. *Id.* at 972.

Recognizing this fact, petitioners and their *amicus* ask the Court somehow to discern between the lines that the parties *really* were contracting for the sale of goods. But the plain terms of the SWU contracts—and in particular, the clear intent that the utility maintain title to the uranium feed at all times—defeat any such interpretation. U.S. Pet. App. 20a. Under the contracts, the enricher's obligation is to provide a service—separating the uranium feed into enriched and depleted uranium.[6] The utility's obligation is to provide uranium feed and pay for the SWUs necessary to complete the

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[6] That actual title remains "at all times with the utility" is demonstrated by the facts that the enricher does not "have the power to sell a utility's feedstock to a third party" and the feed "does not become an asset of the enricher, nor is it ever reflected as such on the enricher's books and records." U.S. Pet. App. 40a-41a.

separation; the utility then receives back enriched and depleted uranium. *Id.* 45a. Payment under a SWU contract is based on the quantity and value of those separative work units—the service—not the LEU itself.[7] The lengths to which Commerce had to go to construct a "sales" price "begs the question whether these transactions can truly be construed as relevant sales of merchandise." *Id.*

### 3. Nothing in the history of the antidumping law suggests that "sold" has a special meaning in the statute.

Since the original enactment of the Antidumping Act of 1921, the statute has consistently applied to "foreign merchandise" that "is being sold or is likely to be sold in the United States." Antidumping Act of 1921, § 201, *codified at* 19 U.S.C. § 160.[8] From that

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[7] Under Commerce's (now withdrawn) tolling regulation addressing contractors and subcontractors (formerly 19 C.F.R. 351.401(h)), Commerce policy dictated that where the price paid includes only the value added by the services performed, and not the entire value of the merchandise, "there is no cognizable sale under the antidumping duty law." U.S. Pet. App. 205a-206a.

[8] Nothing in the amendments to the antidumping law in 1954, 1958, 1968, or 1975 altered this language. *See* Pub. L. No. 83-768, § 301, 68 Stat. 1138 (1954); Pub. L. No. 85-630, Sec. 1, 72 Stat. 583, 585 (1958); Pub. L. No. 90-634, § 201, Oct. 24, 1968, 82 Stat. 1347 (1968); Pub. L. No. 93-618, Sec. 321(a), 88 Stat. 2043 (1975). And in 1979, when the Antidumping Act of 1921 was repealed and replaced, the statute continued to apply only where "foreign merchandise is being, or is likely to be, sold in the United States." Pub. L. No. 96-39, Title I, § 101, 93 Stat. 162 (1979), *codified at* 19 U.S.C. § 1673.

time, the concern has consistently been "to prevent the stifling of domestic industries by the dumping of foreign merchandise upon the American market at less than its fair value in the country of production." H.R. Rep. No. 66-479 (1919) at 1; *id.* at 2-3 (pointing to specific products being sold at low prices in the United States by German producers). Antidumping duties are thus imposed "to offset the amount of the difference between the fair value of the merchandise and the price for which it is sold in the United States, *i.e.*, the dumping margin." S. Rep. No. 96-249 (1979) at 37; *see also id.* at 61 (same). This formula has not changed since 1921.

Nothing in the antidumping law suggests that Congress meant to imbue the term merchandise "sold" with any special meaning. And nothing in the statute's history justifies an inference that contracts for the provision of services could be considered contracts for the sale of goods. U.S. Pet. App. 23a.

In the context of leasing agreements, however, Congress *has* expanded the reach of the antidumping law. In 1984, Congress recognized that when merchandise was imported through a leasing agreement, it was not subject to antidumping duties under the then-current statute—because a lease is not a "sale" of foreign merchandise. H.R. Rep. No. 98-725 (1984) at 11. Congress accordingly determined that when lease agreements were used to accomplish "what are in effect transfers of ownership," the transaction should be subject to antidumping duties. *Id.* Congress amended the statute to provide explicitly that "sales" would include leases of merchandise that are "tantamount" and "equivalent" to sales. *Id.* Section 1673 now

expressly advises that "a sale of foreign merchandise includes the entering into of any leasing arrangement regarding that merchandise that is equivalent to the sale of that merchandise." 19 U.S.C. § 1673(2).[9]

Congress also provided explicit guidance on when leasing arrangements were to be subject to the antidumping statute by identifying six factors Commerce "shall consider" in assessing whether a given lease of a product is equivalent to a sale of that product. *See* 19 U.S.C. § 1677(19) (enacted 1988). The lease-equivalent-to-sale amendment was designed to solve a particular problem—transactions where "capital goods, such as airplanes, heavy electrical equipment, machine tools, construction equipment, and other 'big ticket' items" were being "leased" rather than bought. H.R. Rep. No. 100-576 (1988) at 615; *id.* at 616 (noting that amendment would cover "leases of the type used in international leasing of commercial aircraft by companies such as Airbus Industrie").

Petitioners point to Congress's enactment of the lease-equivalent-to-sale amendment as *support* for their position. U.S. Br. 30-32; USEC Br. 33, 52. Quite the contrary: the 1984 amendment confirms

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[9] Petitioners rely heavily on cases holding that leases can sometimes be equivalent to sales. U.S. Br. 29 (citing *United Gas Improvement Co.* v. *Continental Oil Co.*, 381 U.S. 392 (1965) and *Gray* v. *Powell*, 314 U.S. 402 (1941)); USEC Br. 31, 35 (citing same); CSUSTL Br. 11 (citing same). But these cases have no relevance here, because Congress has not stated that *services* can be "equivalent to sales" of goods in the antidumping context.

that when Congress wishes to change the scope of the antidumping statute to encompass a transaction not commonly thought to be a "sale," Congress knows how to do it.

Congress has not made similar legislative adjustments with regard to contracts for *services*. This Court should not "by implication" extend the statute's exceptions beyond those specifically identified by the legislature. *Helvering* v. *William Flaccus Oak Leather Co.*, 313 U.S. 247, 251 (1941); *see also Commissioner* v. *Starr Bros.*, 204 F.2d 673, 674-675 (2d Cir. 1953) (explaining, in the tax code context, that "[w]hen Congress has wished to tax as capital gains receipts which would not fall within the ordinary meaning of 'sale or exchange' of assets, it has dealt specifically with such transactions").

### B. Other Statutes Involving Sales Of Goods Have Been Interpreted In Line With The Ordinary Meaning Of Those Terms.

A variety of statutes dealing with international trade apply to "sales" and other types of movement of goods in international commerce. The word "sale" in the antidumping and other international trade statutes has consistently been held to invoke the ordinary meaning of the term. *See, e.g.*, *Enercon GmbH* v. *International Trade Comm'n*, 151 F.3d 1376, 1381-82 (Fed. Cir. 1998) (interpreting Section 337 of the Tariff Act, 19 U.S.C. § 1337, and concluding that where the term "sale" is not defined, "Congress intended to give the term its ordinary meaning"); *VWP of Am., Inc.* v. *United States*, 175 F.3d 1327, 1339 (Fed. Cir. 1999) ("in order for merchandise to be 'sold' for purposes of [the Customs

valuation statute], there must be a transfer of title from one party to another for consideration"); *Wood* v. *United States*, 62 C.C.P.A. 25, 33, 505 F.2d 1400, 1406 (1974) (examining "export value" under former Customs valuation statute and giving the term "sale" its ordinary meaning).

In the antitrust context, the Robinson Patman Act, like the antidumping statute, applies only where "commodities are sold * * * within the United States." 15 U.S.C. § 13(a). Because the statute is limited by its terms to price discrimination in the sale of "commodities," it has been held inapplicable to transactions involving services—which courts consistently find do not fall within the ordinary understanding of "sales" of "commodities." *See, e.g.*, *Metro Comm'ns Co.* v. *Ameritech Mobile Comm'ns, Inc.*, 984 F.2d 739 (6th Cir. 1993) (cellular telephone services); *Freeman* v. *Chicago Title & Trust Co.*, 505 F.2d 527 (7th Cir. 1974) (title insurance); *Tri-State Broad. Co.* v. *United Press Int'l, Inc.*, 369 F.2d 268 (5th Cir. 1966) (news information service); *Standfacts Credit Servs., Inc.* v. *Experian Info. Solutions, Inc.*, 405 F. Supp. 2d 1141, 1156 (C.D. Cal. 2005) (credit reports); *Berlyn, Inc.* v. *The Gazette Newspapers, Inc.*, 157 F. Supp. 2d 609, 621 (D. Md. 2001) (newspaper advertising); *TV Comm'ns Network, Inc.* v. *ESPN, Inc.*, 767 F. Supp. 1062, 1076 (D. Colo. 1991) (cable service), *aff'd*, 964 F.2d 1022 (10th Cir. 1992); *SCM Corp.* v. *Xerox Corp.*, 394 F. Supp. 384 (D. Conn. 1975) (photocopying).

So too under Section 3 of the Clayton Act, which applies to a "lease or * * * a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities." 15 U.S.C. § 14. Section 3 has

been found inapplicable where the contract is for a sale of services rather than goods. *See, e.g., Hudson Valley Asbestos Corp.* v. *Tougher Heating & Plumbing Co.*, 510 F.2d 1140, 1145 (2d Cir. 1975) (insulation services). A contract for a license to manufacture a good similarly is not sufficient to come within the terms of Section 3. *See, e.g., Linzer Prods. Corp.* v. *Sekar*, 499 F. Supp. 2d 540, 556 (S.D.N.Y. 2007); *Tele Atlas N.V.* v. *Navteq Corp.*, 397 F. Supp. 2d 1184, 1192 (N.D. Cal. 2005).

In the tax context, the term "sale" has regularly been interpreted as incorporating the ordinary definition of a "sale." This Court has reasoned that because a sale is a "common event in the non-tax world," where the term "sale" is used in the tax code "without limiting definition and without legislative history indicating a contrary result, its common and ordinary meaning should at least be persuasive of its meaning as used in the Internal Revenue Code." *Commissioner* v. *Brown*, 380 U.S. 563, 570-571 (1965). *See also United States* v. *Seattle-First Nat'l Bank*, 321 U.S. 583, 590 (1944) (applying ordinary meaning to word "sold" in the Revenue Act of 1926); *Helvering*, 313 U.S. at 249 (holding that term "sale" in Revenue Act of 1934 should be given its ordinary meaning and that "demolition of property and subsequent compensation for its loss by an insurance company" does not fall within that meaning); *United States* v. *King*, 1995 WL 32620, at *2 (4th Cir. Jan. 30, 1995) (applying ordinary meaning to word "sold" in tax credit provision of Internal Revenue Code).[10]

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[10] Courts likewise apply the ordinary meaning to the term "merchandise" in the tax code. *See Wilkinson-Beane,*

The Patent Act also uses the term "sells," in setting out the scope of infringing activity. *See* 35 U.S.C. 271(a) ("whoever without authority * * * sells any patented invention[ ] within the United States * * * infringes the patent"). Courts again confer on the word "sell" as used in that Act the ordinary understanding of that term. *See NTP, Inc.* v. *Research In Motion, Ltd.*, 418 F.3d 1282, 1319 (Fed. Cir. 2005); *Fellowes, Inc.* v. *Michilin Prosperity Co., Ltd.*, 491 F. Supp. 2d 571, 577 (E.D. Va. 2007).

Finally, under the Uniform Commercial Code ("UCC"), a sale "consists in the passing of title from the seller to the buyer for a price." U.C.C. § 2-106. The UCC applies only to sales of goods. *Id.* § 2-102. And the UCC has twice been held specifically inapplicable to SWU contracts—on the *government's* argument that *SWU contracts do not involve a sale of goods*. In *Barseback Kraft AB* v. *United States*, 36 Fed. Cl. 691, 705 (1996), *aff'd*, 121 F.3d 1475 (Fed. Cir. 1997), the Federal Government took the position that SWU contracts were for services, not for goods, based on both the form of the transaction—"Under the contracts, the individual utilities supply the USEC with the uranium. The USEC then enriches

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*Inc.* v. *Commissioner*, 420 F.2d 352, 354 (1st Cir. 1970) ("In construing the word 'merchandise' we apply the rule that 'the natural and ordinary meaning of the words used will be applied (in construing tax statutes) unless the Congress has definitely indicated an intention that they should be otherwise construed * * *.'") (quotation omitted). This ordinary definition includes "'goods purchased in condition for sale,' 'goods awaiting sale,' 'articles of commerce held for sale,' and 'all classes of commodities held for sale.'" *Id.*

the uranium and returns to the customer uranium enriched to the customer's specifications."—and the substance of the transaction—"The price paid by the customer is based on the number of SWUs required to enrich the uranium to the customer's specifications." *Id.* In form and substance, "[i]t is clear, then, from the process itself, that the customers are contracting for services, not goods, from the USEC." *Id.* So too in *Centerior Serv. Co.* v. *United States*, No. 95-103c, 1997 U.S. Claims LEXIS 323, at *19 (Fed. Cl. Dec. 29, 1997) (SWU contracts "are for uranium enrichment services," not contracts for goods governed by the UCC). Simply put, if a SWU contract is not a contract for the sale of a good under the UCC, neither is it one for "merchandise * * * sold" under the antidumping statute.[11]

All of these statutes arise from and are applied in different contexts; yet each makes clear that "the common, or usual meaning of the term sale includes those situations in which a contract has been made between two parties who agree to transfer title and possession of specific property for a price." *Enercon GmbH* v. *International Trade Comm'n*, 151 F.3d 1376, 1381-82 (Fed. Cir. 1998).

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[11] The Government's consistent position, until this case, has been that SWU contracts involve services, not sales. In *Florida Power & Light Co.* v. *United States*, 307 F.3d 1364, 1372 (Fed. Cir. 2002), the United States argued that SWU contracts involved no "disposal of property," and thus were outside the jurisdiction of the Contracts Dispute Act. The court agreed, emphasizing that "the nature of the contractual pricing scheme" persuasively shows that "the transaction is properly characterized as a service rather than a sale." *Id.* at 1373.

### C. Other International Trade Statutes Expressly Apply To *Imported* Merchandise, Whether Or Not *Sold*.

Congress limited the scope of the antidumping law to "merchandise * * * sold" in the United States, but it has given a different scope to other international trade statutes, for example expressly authorizing their application to imports without regard to whether a "sale" of "merchandise" has occurred. The scope of these statutes amply demonstrates that Congress can capably differentiate among trade remedies triggered only by the sale of merchandise and trade remedies triggered by importation of goods even if not sold. *See* 2A N. Singer, Sutherland on Statutes and Statutory Construction § 46:06, at 194 (6th ed. 2000) ("The use of different terms within similar statutes generally implies that different meanings were intended"); *see also Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 712 n.9 (2004) (applying this "usual rule" of statutory construction). No international trade statute other than the antidumping law uses the sale price of merchandise in the United States as the prerequisite to imposing a remedy.[12]

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[12] The antidumping statute requires a sale price for goods in the United States—known as the "export price" or "constructed export price"—because the antidumping duty must be calculated based on the difference between the price in the United States and the "normal value" of the goods.

### 1. The countervailing duty law—unlike the antidumping law—applies both to imports and sales of goods into the United States.

Countervailing duties seek to offset foreign subsidies that may give an unfair competitive advantage to foreign manufacturers, producers, or exporters over U.S. producers. *See* 19 U.S.C. § 1671. And in contrast to the antidumping law, Congress provided in the countervailing duty law that countervailing duties may be applied both to (1) merchandise "imported" into the United States,[13] and (2) merchandise "sold (or likely to be sold) for importation" into the United States. *See id.*; H.R. Comm. on Ways and Means, *Overview and Compilation of U.S. Trade Statutes*, Vol. 1, at 101 (2005 ed.); *see also* Trade Agreements Act of 1979, Report and Statement of Administrative Action, S. Rep. No. 96-249 at 43 (1979) (explaining revised countervailing duty law); S. Comm. on Finance, *Omnibus Tariffs and Trade Measures, Explanation of Provisions*, S. Rep. No. 98-219 at 22 (1979) (discussing addition of "sales or likely sales for importation" to statute which previously only applied to "imports").

The countervailing duty statute thus has a different scope from that of the antidumping statute—which is logical. The antidumping statute focuses on the selling prices of merchandise in the United States, while the countervailing duty statute

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[13] The word "import" has been defined by this Court as "articles brought into a country." *Brown* v. *Maryland*, 25 U.S. 419, 437 (1825).

focuses not on prices, but on the provision of subsidies by foreign governments with respect to imported goods.[14]

### 2. Section 337 of the Tariff Act applies to unfair methods of competition and unfair acts in the importation of goods *or* sale of goods after importation.

Section 337 of the Tariff Act of 1930 also applies to *imports or sales* of certain goods—rather than exclusively to sales of goods. *See* 19 U.S.C. § 1337(a)(1). The purpose of Section 337 is to prevent articles from being imported *or* sold into the United States in violation of intellectual property rights. It makes unlawful: (1) "[u]nfair methods of competition and unfair acts in the importation of articles * * * *or* in the sale of such articles" in the United States where a domestic industry exists or is being established, and (2) "[t]he importation into the United States, the sale for importation, *or* the sale within the United States after importation" of articles that infringe a valid and enforceable United States patent, copyright, trademark, or design right, or articles that are produced under a process covered by a valid and enforceable United States patent. *Id.* (emphases added).

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[14] The court of appeals held that the purchase of uranium enrichment services by the French government for greater than adequate remuneration was not subject to countervailing duties. U.S. Pet. App. 24a-27a; 19 U.S.C. § 1677(5)(E)(iv). Petitioners did not appeal this determination.

The express language of Section 337 again makes clear that where Congress intends to apply a trade remedy statute to imports into the United States—and not only to "sales" of merchandise in the United States—it knows the words to use.

### 3. The "safeguard," or "escape clause," statute in the Trade Act of 1974 likewise applies to imports without regard to whether they are sold.

A third relevant trade remedy statute is the "safeguard" or "escape clause" statute. *See* 19 U.S.C. §§ 2251-54. Enacted in the Trade of Act of 1974, the statute is designed "to provide adequate procedures to safeguard American industry and labor against unfair or injurious import competition, and to assist industries, firm[s], workers, and communities to adjust to changes in international trade flows." *Id.* § 2102(4). Under this statute, if the ITC determines that "an article is *being imported into the United States* in such increased quantities" as to be a "substantial cause of serious injury" to the domestic industry producing a "like or directly competitive" article, then the President of the United States may act to protect the injured domestic industries. *Id.* § 2251(a) (emphasis added). The statute is thus "the answer to complaints from the United States Congress about the effects of liberalized trade." Raj Bhala, *Modern GATT Law: A Treatise on the General Agreements on Tariffs and Trade* 940 (2005). *See generally* Thomas P. Maltese, *Congress's Causation Conundrum: Rethinking the United States's*

*Approach to Escape Clause Actions*, 17 Kan. J.L. & Pub. Pol'y 520, 526 (2008).[15]

Again unlike the antidumping law, Congress specified that the safeguard statute applies to imports with no requirement that there be sales (or likely sales) of merchandise in the United States. The key inquiry is whether "an article is being *imported into the United States*" so as to cause or threaten serious injury to a domestic industry that produces competing articles. 19 U.S.C. § 2252(b) (emphasis added). Congress therefore intended the safeguard law to provide relief from injury caused by imports into the United States, without any requirement that there to be a sale of merchandise in the United States.

**4. Section 421 applies to increased imports of Chinese-origin products.**

In 2000, Congress enacted a trade statute that provides a remedy for domestic producers and manufacturers faced with increased imports of goods from China. This statute too is intended to authorize restrictions on *imports*—without regard to whether they are "sold" in the United States, if the ITC concludes that "market disruption" causes or threatens "material injury" to a domestic industry making competing products. *See* Section 421 of the Trade Act of 1974, as added by the Act of Oct. 10,

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[15] Another provision of the Trade Act of 1974 provides assistance to U.S. workers who can demonstrate that increases of *imports* of articles competitive with articles produced by the workers' firm—without regard to sales of those imports—contributed to the loss of their jobs. *See* 19 U.S.C. § 2272(a)(2)(A).

2000, Pub. L. No. 106-286, § 103(a)(3), 114 Stat. 882, *codified at* 19 U.S.C. § 2451. Section 421 thus is intended to address injury from imports, whether or not they are sold.

Section 421, like the safeguard statute referred to above, requires investigation by the ITC into whether imports cause or threaten "injury" to a domestic industry. 19 U.S.C. § 2451(b)(1). Under both statutes, the President makes the final decision whether to provide a remedy, after an affirmative "injury" determination by the ITC.

## II. PETITIONERS' "LOOPHOLE" ARGUMENTS ARE IRRELEVANT AND OVERBLOWN.

### A. The Result Of A *Chevron* Analysis Does Not Change Because Of A Purported "Loophole."

Petitioners and *amicus* CSUSTL urge the Court to rewrite the statute to avoid what they see as a "loophole" left by Congress that they believe should be closed. U.S. Br. 18, 34; USEC Br. 23-24; CSUSTL Br. 4. That is not how statutory interpretation works. Neither the Commerce Department nor the courts are permitted to re-write unambiguous language in a statute. *See Lamie* v. *U.S. Trustee*, 540 U.S. 526, 538 (2004) (rejecting argument that would have resulted in the "enlargement" rather than "construction" of a statute "so that what was omitted * * * may be included within its scope") (quoting *Iselin* v. *United States*, 270 U.S. 245, 251 (1926)). "[T]he fact that Congress might have acted with greater clarity or foresight does not give courts a *carte blanche* to redraft statutes in an effort to achieve that which Congress is perceived to have

failed to do." *United States* v. *Locke*, 471 U.S. 84, 95 (1985). Courts are not "licensed to attempt to soften the clear import of Congress' chosen words whenever a court believes those words lead to a harsh result." *Id.*

Nor is there any precedent for allowing a party to invoke the possibility of a "loophole" as a reason to override the canon that, absent an indication by Congress to the contrary, Congress intends the words in its enactments to carry their common meaning. *See National R.R. Passenger Corp.* v. *Morgan*, 536 U.S. 101, 110 n.5 (2002); *Walters* v. *Metropolitan Educ. Enters., Inc.*, 519 U.S. 202 (1997); *Pioneer Inv. Servs. Co.* v. *Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 388 (1993). Here, the statute unambiguously provides that only sales of "merchandise" and leases "equivalent" to sales of "merchandise" are subject to antidumping duties. In enacting the leasing provision, Congress confirmed that it can and will remedy a "loophole" it concludes needs closing. *See Lamie*, 540 U.S. at 538 (expressing the Court's "unwillingness to soften the import of Congress' chosen words even if we believe the words lead to a harsh outcome is longstanding").

### B. Petitioners' "Loophole" Argument Ignores The Global Market's Practical Realities.

Petitioners and CSUSTL also contend that if the Court upholds the Federal Circuit's conclusion that the ordinary meaning of "merchandise * * * sold" does not include the provision of enrichment services, foreign producers around the globe will rapidly restructure their contracts with U.S. purchasers to

take advantage of the purported "loophole" in the statute. As we already have explained, this sort of scarifying does not alter the straightforward *Chevron* step-one analysis the Federal Circuit and the Court of International Trade properly employed here. Petitioners' rhetoric also ignores the practical realities of operating in the global market. Global companies and industries simply are not likely to overhaul their contracting practices merely for the dubious benefit of a seeming "loophole" in one country's antidumping law.

The example of the uranium enrichment industry itself is instructive. One of the principal differences between SWU contracts and EUP contracts has to do with which party must obtain, transport, and provide uranium feed over the duration of the contract.[16] In an EUP contract, the enricher bears the risk of price fluctuations for feed material; in a SWU contract, that risk is borne by the utility. Who bears the risk of feed price is no trifling detail; "[u]ranium prices are very volatile." GAO Report 08-606R, *Nuclear Material: DOE Has Several Potential Options for Dealing with Depleted Uranium Tails, Each of Which Could Benefit the Government* at 8 (Mar. 31, 2008) ("GAO Report 08-606R"). Uranium prices increased more than seventeenfold over the past several years, from $21 per kilogram in November 2000 to $360 per kilogram in mid-2007, before declining to $200 per kilogram in February 2008. *Id.* at 1, 8.

Another practical reality of the global market is that whichever party has title to the raw materials

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[16] The average contract duration in this case is 5 years. Eurodif Br. 9.

generally determines who pays taxes on those materials and how the materials are carried on a company's books. U.S. Pet. App. 41a.; *see also* U.S. Pet. App. 185a ("USEC has required its utility customers to pay all property tax on what it views, correctly, as the 'customer's feed.'"). In this case, for example, the record demonstrates that enrichers do not recognize the uranium feed—to which the utility maintains title—as an asset on their books. U.S. Pet. App. 185a.

The particular contractual arrangement two parties select also determines which of them bears the risk for other supply chain constraints, labor shortages, strikes, equipment costs, financing and capital investments, transportation costs, liability costs, insurance, and disposal of remnant materials like scrap or defective parts. To obtain LEU, for example, uranium feed is separated into LEU and tails. The type of contractual arrangement determines which party faces the risks and benefits of dealing with the tails. U.S. Pet. App. 21a (SWU contracts typically grant rights to utilities over depleted uranium tails). On the one hand, tails are expensive to store and maintain. *See* GAO Rep. 08-606R at 7 (tails owned by the Department of Energy cost $4 million annually to store and maintain). But tails can also be re-enriched and sold as either natural or enriched uranium. U.S. Pet. App. 231a. Depending on the price of uranium, the contractual right to the tails offered by a SWU contract can be of significant value. *See* GAO Rep. 08-606R at 1, 3, 4 (estimating the value of the Department of Energy's tails at $7.6 billion based on Feb. 2008 uranium price; given the price fluctuations of uranium over

the past eight years, the value could range "from nothing to more than $20 billion"); Ux Weekly, Apr. 7, 2008, Vol. 22, issue 14, at 5, *available at* http://www.uxc.com/products/UxW22-14.pdf (USEC contending that re-enriching most of the Department of Energy's high-assay tails between 2008-2021 could create up to $8 billion for the U.S. Treasury).

Even if "loophole exploitation" were an appropriate consideration for the Court, therefore, the many practical and financial implications of altering contractual arrangements refute petitioners' speculation that reading the antidumping law by its plain terms will result in a major shift in contracting practices.

## III. PUBLIC POLICY AND OTHER AVAILABLE TRADE AND COMPETITION LAWS SUPPORT THE LOWER COURTS' CONSTRUCTION OF THE ANTIDUMPING LAW.

Congress intended the antidumping law to remedy a specific problem: international price discrimination in the sale of goods. Expanding the scope of the antidumping law as petitioners urge would harm significant domestic constituencies and interests not currently represented or considered in antidumping proceedings. And other trade and competition laws are available to remedy injuries to domestic industries.

### A. The Antidumping Law Focuses On Preventing Harm To Domestic Producers From Sales Of Low-Priced Goods.

Petitioners' *amicus* CSUSTL asserts that the Court should give the antidumping statute a "broad reading" because it has a "remedial purpose." CSUSTL Br. 19. This suggestion fails to acknowledge that the antidumping law is intended to provide remedial relief to domestic producers and manufacturers only under specifically limited circumstances.

To begin with, not all sales of goods at less than fair value are subject to antidumping duties. For example, before antidumping duties may be imposed, the Commission typically must determine that "an industry in the United States * * * is materially injured, or * * * is threatened with material injury." 19 U.S.C. § 1673(2)(A). The term "industry" in the antidumping law is limited to "*producers* as a [w]hole of a *domestic like product*, or those *producers* whose collective output of a domestic like product constitutes a major proportion of the domestic like production of the product." *Id.* § 1677(4)(A) (emphases added).

The antidumping law accordingly is concerned with protecting U.S. producers that are injured or threatened with material injury from sales of subject merchandise in the United States; it is not concerned with the impact of antidumping duties on consumers or industrial users of this merchandise. *See Withdrawal of Regulations Governing the Treatment of Subcontractors ("Tolling" Operations)*, 73 Fed.

Reg. 16,517, 16,517 (Mar. 28, 2008) ("the Department's statutory mandate" is "to provide relief to *domestic industries* suffering material injury") (emphasis added).

In addition, and unlike most trade and competition statutes,[17] the antidumping law does not permit consideration of the interests of other affected U.S. constituencies such as U.S. workers (including, for example, Alcoa's 28,000 U.S. employees) and manufacturers that require access on competitive terms to imported raw materials. Harm caused by antidumping duties to downstream users and consumers of imported materials, including Alcoa, is not considered in determining whether to impose antidumping duties. *See, e.g., Certain Frozen or Canned Warmwater Shrimp and Prawns from Brazil, China, Ecuador, India, Thailand, and Vietnam*, USITC Pub. 3748, Inv. Nos. 731-TA-1063-1068 (Final) at 55 (Jan. 2005) (Commissioner Pearson, dissenting) (discussing harm to U.S. consumers from imposing antidumping duty but recognizing that the antidumping laws "do not permit the Commission to consider [consumer] issues in making injury determinations in an antidumping investigation").

The fact that the interests of downstream users and consumers are left out of the antidumping injury analysis reinforces that the statute's specifications must be construed as written and no further. And one of those specifications is that duties may only be assessed on merchandise sold in the United States.

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[17] *See* 19 U.S.C. § 1337 (intellectual property); 19 U.S.C. § 2251 (safeguards); 19 U.S.C. § 2451 (China safeguard).

The antidumping law relatedly does not provide procedural protection to downstream users and U.S. consumers even though they can be negatively affected by antidumping duties. The Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*, does not apply to antidumping hearings, *see* 19 U.S.C. § 1677c(b), and antidumping proceedings are characterized as investigatory rather than adjudicatory. *See, e.g.*, *Avesta AB* v. *United States*, 689 F. Supp. 1173, 1189 (Ct. Int'l Trade 1988).[18] Further, because downstream users and consumers of imported materials are not "interested parties" in antidumping proceedings (*see* 19 U.S.C. § 1677(9)), they cannot access confidential business information critical to the ITC's and Commerce's proceedings. 19 U.S.C. § 1677f(c)(1). Nor can they appeal adverse final dumping determinations. 19 U.S.C. § 1516a(a)(1), (2). *See, e.g.*, *Withdrawal of Tolling Regulations*, 73 Fed. Reg. at 16,517 ("Purchasers of subject merchandise do not qualify as interested parties under [§ 1677(9)]. Purchasers who have obtained the status of 'foreign producers' under the [tolling] regulation, however, become interested parties in error."). That the antidumping law does not provide procedural protections to affected users and consumers reinforces that this law homes in on a particular harm—injuries to U.S. producers from sales of underpriced goods—and offers a particular remedy. It should not be expanded beyond that carefully delineated purpose.

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[18] There are no rights of apprisal, cross-examination, confrontation, or discovery in antidumping proceedings. *Id.*; *Budd Co. Ry. Div.* v. *United States*, 507 F. Supp. 997, 1001 (Ct. Int'l Trade 1980).

### B. Anticompetitive Activities Outside The Scope Of The Antidumping Law Remain Subject To Other Trade and Competition Laws.

CSUSTL claims that the antidumping law is "the only defense available to U.S. manufacturers against unfairly traded imports," leaving manufacturers "no recourse" in the event of an affirmance here. CSUSTL Br. 22. That simply is not so. Numerous statutes protect competition, prohibit predatory pricing, and forbid unlawful restraints on trade, even when the injury is from abroad. The Sherman Act, as amended by the Foreign Trade Antitrust Improvements Act of 1982, applies to conduct involving trade or commerce that has a "direct substantial, and reasonably foreseeable" effect on domestic commerce or U.S. import trade that "gives rise to a [Sherman Act] claim." 15 U.S.C. § 6a; *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 796 (1993) (holding that "it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States."). The Federal Trade Commission Act, the Clayton Act, and the Robinson Patman Act also protect against certain competitive injuries from abroad. *See* II *Antitrust Law Developments*, 1185-86 (6th ed. 2007) (citing cases); *see also Antitrust Enforcement Guidelines for International Operations*, U.S. Dep't of Justice and Federal Trade Commission (Apr. 1995), available at http://www.usdoj.gov/atr/public/guidelines/internat.htm (describing how "[f]oreign commerce cases can involve almost any provision of the antitrust laws"

and providing illustrative examples under numerous antitrust laws).

Other international trade statutes address increased imports, unfair practices, and violations of trade agreements; they also remain available to injured domestic producers. *See supra* at 21-26. These other statutes, as we have explained, provide various forms of protection against anticompetitive actions and unfair trade practices. The antidumping statute, for its part, has never been brought to bear against services like those at issue here. The antidumping law focuses on the prices of goods sold in the United States. It is not a broad panacea, and it should be applied—as Congress intended—only where "the sale or likely sale of goods at less than fair value" has taken place. 19 U.S.C. § 1677(34).

## CONCLUSION

For the foregoing reasons, as well as those in respondents' briefs, the Federal Circuit's decision should be affirmed.

Respectfully submitted,

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